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April 19, 2016

Timothy D. Baker
State Archivist
Maryland State Archives
350 Rowe Boulevard
Annapolis, Maryland 21401

Dear Mr. Baker:

You have inquired about whether medical records that are in the custody of the State Archives that were admitted into evidence in a court case are "universally open to public inspection, or whether there are elements within the records that require the records to be examined and redacted before presentation to a party other than a person in interest." In my view, subject to certain exceptions, the Maryland Rules, the Maryland Public Information Act ("PIA"), and the Medical Records Act, generally prohibit the public inspection of court records in the custody of the State Archives that contain medical or psychological information or records about an individual, other than an autopsy report of a medical examiner. Inspection of such records is specifically authorized, however, with the consent of, or for a person in interest, in response to compulsory process, or under other limited circumstances.

Maryland Rule 16-1006(k) requires a custodian of a court record to deny inspection of a case record containing certain medical information, except as otherwise provided by law, court order, or rule. Specifically, the prohibition applies to "[a] case record, other than an autopsy report of a medical examiner, that (A) consists of a medical or psychological report or record from a hospital, physician, psychologist, or other professional health care provider, and (B) contains medical or psychological information about an individual." Other types of medical records are also specifically excluded from disclosure under the rule, including records relating to HIV testing, the existence of an infectious disease, child-fatality review, petitions for emergency evaluation, and examination and treatment of a person with developmental disabilities. *Id.*

Under the PIA, a custodian is required to deny inspection of the part of a public record that contains: (1) "medical or psychological information about an individual, other than an autopsy report of a medical examiner;" (2) "personal information about an individual with, or perceived to have, a disability as defined in § 20-701 of the State Government Article; or" (3) "any report on human immunodeficiency syndrome submitted in accordance with Title 18 of the Health – General Article." Md. Code Ann., General Provisions Article ("GP"), § 4-329(b). The prohibition does not apply to a nursing home or an assisted living program. GP § 4-329(a). A custodian is required

to allow the "person in interest" to inspect the public record to the extent allowed under the Medical Records Act in § 4-304(a) of the Health – General Article ("HG"). GP § 4-329(c). "Person in interest" is defined, in pertinent part, as "a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit[.]" GP § 4-101(e). Under additional restrictions in the PIA, a custodian is required to deny inspection of a "hospital record" that: (1) relates to medical administration, staff, medical care, or other medical information; and (2) contains general or specific information about one or more individuals. GP § 4-306.

Finally, under provisions safeguarding the confidentiality of medical records in HG § 4-302(d), a disclosed medical record may not be redisclosed unless the redisclosure is: (1) authorized by the person in interest; (2) otherwise permitted under the Medical Records Act in HG Title 4, Subtitle 3 (disclosure by health care providers); (3) permitted under § 1-202(b) or (c) of the Human Services Article (authorized disclosures of reports of child abuse or neglect); or (4) directory information (information about the presence and health condition of a patient admitted into, or receiving emergency care at, a health care facility, kept only while the patient is at the facility).

Additionally, this office has previously advised that a non-health care provider third party who receives medical records in compliance with the Medical Records Act "stand[s] in the shoes of the health care provider who originally disclosed the records, and must produce those records in response to compulsory process, subject to the same requirements and limitations as apply to the health care provider." *See* Letter of Advice to the Honorable Joseph F. Vallario, Jr. from Asst. Att'y. Gen. Kathryn M. Rowe (February 8, 2013) ("Vallario letter") (attached). In such an instance, to the extent a health care provider is required to disclose medical record information in response to compulsory process or court order, State Archives may be subject to the same requirements and limitations with respect to disclosure or redisclosure of medical records and information.

As a result, in my view, court records containing medical record information that are in the custody of State Archives are subject to the various restrictions against public inspection or disclosure of medical information contained in Rule 16-1006, GP § 4-329, and HG § 4-302(d). In general, public inspection of medical records in the custody of the State Archives is prohibited, except where specifically authorized under those provisions of law, or when required pursuant to compulsory process or court order as discussed in the Vallario letter.

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 8, 2013

The Honorable Joseph F. Vallario, Jr.
101 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Vallario:

You have asked for advice concerning the Maryland Medical Records Act. Specifically, you have asked whether a non-health care provider third party who has legally obtained medical records from a health care provider under the Medical Records Act is required to produce those medical records in response to compulsory process. If the answer is yes, you ask about the source of the authority to redisclose the records in response to compulsory process, and whether the third party stands in the shoes of the health care provider with respect to the records under Health - General Article ("HG"), §§ 4-306 and 4-307 and Courts and Judicial Proceedings Article ("CJ"), §§ 9-109, 9-109.1, and 9-121. It is my view that non-health care provider third parties who receive medical records in compliance with the Medical Records Act do stand in the shoes of the health care provider who originally disclosed the records, and must produce those records in response to compulsory process, subject to the same requirements and limitations as apply to the health care provider.

The State Medical Records Law was enacted in 1990. Chapter 480, Laws of Maryland 1990, *codified at* HG § 4-301 *et seq*. It governs disclosure of medical records by "health care providers," as well as the use and redisclosure of any records by those to whom medical records are disclosed. 94 *Opinions of the Attorney General* 44, 48 (2009). The Medical Records Law requires a health care provider to keep the medical record of a patient confidential and to disclose the medical record only as provided in the Medical Records Law or as otherwise provided by law. HG § 4-302(a). The Medical Records Act requires the disclosure of a medical record on the authorization of a person in interest. HG § 4-303(a). Section 4-305 lists instances in which a health care provider may disclose a medical record without the authorization of a person in interest, none of which are relevant here. Section 4-306 lists instances in which a health care provider must disclose a medical record without the authorization of a person in interest. Among these are to health professional licensing and disciplinary boards in accordance with a subpoena; in accordance with compulsory process and to law enforcement agencies and prosecutors pursuant to a subpoena, warrant or court order. Section 4-307 imposes additional protections with respect to disclosure of a medical record developed in connection with the provision of mental health services.

As it relates to the various forms of compulsory process, which include a subpoena, summons, warrant, or court order, HG § 4-306(a), the Medical Records law addresses three distinct categories of disclosure. HG §§ 4-306(b)(2) and 4-307(k)(1)(v) each require a health care provider to disclose a medical record without the authorization of the person in interest to health licensing and discipline boards on subpoena for the sole purpose of an investigation regarding licensure, certification or discipline of a health professional or the improper practice of a health profession.

HG §§ 4-306(b)(7) and 4-307(k)(1)(v)2 permit disclosure by a health care provider to a grand jury, prosecution agency, or law enforcement agency pursuant to compulsory process for the sole purpose of investigating and prosecuting criminal activity provided that the prosecution agency and law enforcement agency have written policies to protect the confidentiality of the medical records. HG § 4-307(k)(1)(v)2, which applies to mental health records, limits the authority to give medical records to law enforcement agencies to those that are under the supervision of prosecution agencies, and allows disclosure for the "sole purposes of investigation and prosecution of a provider for theft and fraud, related offenses, obstruction of justice, perjury, unlawful distribution of controlled substances, and of any criminal assault, neglect, patient abuse or sexual offense committed by the provider against a recipient." In addition, § 4-307 requires that the written procedures to protect the confidentiality of the records be developed in consultation with the Director of the Mental Hygiene Administration and address the maintenance of the records in a secure manner. This provision also requires that, in a criminal proceeding against a provider, a prosecution agency or law enforcement agency, to the maximum extent possible, remove and protect recipient identifying information from the medical records used in the proceeding.

Under HG § 4-306(b)(6), medical records may be disclosed by a health care provider in response to other compulsory process if the health care provider receives: 1) written assurance from the party seeking the records that the person in interest has been notified of the disclosure of the medical records and has not objected within 30 days after the notice was sent (15 days in the case of a Child in Need of Assistance proceeding), or that the objections of a person in interest have been resolved and the request for disclosure is in accordance with the resolution; 2) proof that service of the subpoena, summons, warrant, or court order on the person in interest has been waived by the court for good cause; or 3) a copy of an order entered by a court expressly authorizing disclosure of the designated medical records.

In the case of a court order, other than compulsory process compelling disclosure by a health care provider, HG § 4-307(k)(1)(iv) requires disclosure to a court, administrative judge, health claims arbitrator, or a party to a court, administrative, or arbitration proceeding only as permitted under CJ § 9-109(d), § 9-109.1(d), or § 9-121(d). CJ § 9-109, § 9-109.1, or § 9-121 are similar provisions creating a privilege for certain communications between patients and psychiatrists and psychologists, professional counselors and psychiatric-mental health nursing specialists, and social workers, respectively. Subsection (d) of each section lists the circumstances in which "there is no privilege."

Your question raises the issue of redisclosure by a non-health care provider third party in response to compulsory process. HG § 4-302(d) provides:

> A person to whom a medical record is disclosed may not redisclose the medical record to any other person unless the redisclosure is:
>
> (1) Authorized by the person in interest;
>
> (2) Otherwise permitted by this subtitle;
>
> (3) Permitted under § 1–202(b) or (c) of the Human Services Article; or
>
> (4) Directory information.

"Directory information" is information about the presence and general health condition of a patient who has been admitted to a health care facility or is receiving emergency health care in a health care facility, HG § 4-301(b). It is kept only while the person is at the facility and is generally available to any person who asks unless the patient requests otherwise. HG § 4-302(c). It would not likely be the subject of compulsory process.

Human Services Article, § 1-202(b) and (c) permit the disclosure of reports and records concerning child abuse and neglect. The confidentiality of these reports and records, which may or may not be medical records, and therefore the exceptions to the confidentiality, apply to all persons, whether or not they are health care providers, and whether or not they initially received the records pursuant to the Medical Records Law.

For medical records other than reports and records related to child abuse and neglect, where there is no authorization from the person in interest, the answer to your question depends on whether the redisclosure in response to compulsory process is otherwise permitted by the Medical Records Law.

There are no provisions of the Medical Records Law other than § 4-302(d)(3) that expressly permits the redisclosure of specific records. *Doe v. Maryland Board of Social Workers*, 384 Md. 161, 182 (2004). It is clear, however, that the individual exceptions permitting receipt of medical records permits their disclosure as necessary for the purpose for which they are disclosed. 94 *Opinions of the Attorney General* 44, 72 (2009). The remaining provisions in the Medical Records Act refer to disclosures by health care providers. It is my view, however, that when a non-health care provider obtains medical records under the Medical Records Act, that person stands in the shoes of the health care provider with respect to those records. To hold otherwise could make documents unavailable to compulsory process to which they are made subject by law simply because their

location has been transferred, allowing the evasion of investigations and other matters.[1]

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
vallario48.wpd

[1] I also note that 94 *Opinions of the Attorney General* 44, 47 (2009), which discusses the authority of prosecutors to obtain medical records, mentions the fact that they may often be in the custody of a third party, but does not mention this as a potential obstruction to obtaining those records.